

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

LEVY'S LOAN OFFICE and)	
JOHN FARRANCE)	
)	
Defendants Below/Appellants,)	
)	
v.)	Civil Action No: CPU4-08-000118
)	
LEROY FOLKS,)	
)	
Plaintiff Below/Appellee.)	

Submitted: June 2, 2009

Decided: June 26, 2009

Daniel J. Brown, Esquire
McCarter & English, LLP
405 N. King St., 8th Floor
Wilmington, DE 19801
*Attorney for Defendants
Below/ Appellants*

Michael B. Galbraith, Esquire
Weik, Nitsche & Dougherty
1300 N. Grant Ave., Suite 101
Wilmington, DE 19806
*Attorney for Plaintiff
Below/ Appellee*

Order on Plaintiff Below/Appellee's Motion to Dismiss

This matter is before the court on Plaintiff Below/Appellee Leroy Folks' ("Folks") Motion to Dismiss. On May 8, 2009, following a hearing on the motion, this Court reserved decision and permitted the parties to submit supplemental written arguments.¹ This is the Court's decision.

¹ Counsel for Defendants Below/Appellants Levy's Loan Office and John Farrance submitted a supplemental brief on May 28, 2009. Counsel for Folks notified the Court by letter on June 2, 2009 that he would not submit supplemental argument and would rely on the arguments presented at the May 8, 2009 hearing.

Facts

On August 22, 2008, Folks brought a replevin action in Justice of the peace Court No. 13 against Defendants Below/Appellants Levy's Loan Office and John Farrance ("Levy Loan"). The defendants failed to timely file an answer. On October 22, 2008, the Justice of the Peace Court, pursuant to *J.P. Civil Rule 35*, entered default judgment in favor of Folks and against Levy Loan, ordering replevin of the goods or their value in the amount of \$11,900.00 plus court costs of \$50. The court dismissed Defendant John Farrance ("Farrance") as a party defendant.

On November 6, 2008, Levy Loan filed notice of appeal in this Court. On January 2, 2009, Folks timely filed his Complaint on Appeal. The Complaint alleges Levy Loan, who owns a pawn shop in Wilmington, Delaware entered into various agreements with Folks in which Levy Loan loaned money to Folks and retained various pieces of Folks' personal property as collateral.² Folks further alleged Levy Loan wrongfully demanded payment which exceeded what was due under the agreements, and have subsequently refused to return Folks' property until paid.

On January 22, 2009 Levy Loan filed an Answer, which denied most of the allegations and asserted eight affirmative defenses, and two counterclaims. Levy Loans' first counterclaim moves for declaratory judgment. Levy Loan asserts that Folks voluntarily entered into various agreements with Levy Loan, and later breached those agreements by failing to pay, either the principal and all back interest, or by failing to pay back interest on the loans which caused such loans to be extended.

² The items included six rings, a wedding set, a pendant, two bracelets, a charm, and a bracelet.

Levy Loans' second counterclaim is for abuse of process. Levy Loan asserts that Folks willfully and improperly used this action with improper motive of recovering property and that Folks knows there is no legal basis for his claim. Folks argues that because the issues raised in the answer were not raised in the court below, the appeal violates the mirror image rule. Folks moved to dismiss the appeal for lack of subject matter jurisdiction.

Discussion

The Court is again confronted with the application of the mirror image rule in this appeal from the Justice of the Peace Court. The perplexing issues in these appeals are enhanced by the procedure which permits non-lawyers to represent artificial entities in the Justice of the Peace Court upon executing a Supreme Court form 50.

The *McDowell Rule*, commonly referred to as the Mirror Image Rule, has been long recognized and applied by Delaware Courts.³ The Rule prevents this court from acquiring subject matter jurisdiction over an appeal *de novo* from the Justice of the Peace Court, unless the appeal from the court below contains the identical: 1) parties, 2) character or right in which the parties are sued, and 3) cause and form of the action.⁴ The Rule is now codified in Court of Common Pleas *Civil Rule 72.3(c)*, which provides that an appeal to the Court of Common Pleas “which fails to join the

³ *McDowell v. Simpson*, 1 Houst. 467 (Del. Super. 1857); *Pavetto v. Hansen*, 2004 WL 241914 *1 (Del. Super.)

⁴ *Panzer Management Co. v. Farrall*, 1987 WL 8223 (Del. Super.); *Pavetto v. Hansen*, 2004 WL at 1 (Del. Super.)

identical parties and raise the same issues that were before the court below shall result in dismissal on jurisdictional grounds.”⁵

Application of the mirror image rule depends in large part upon the character of the pleadings as the court has recognized by holding that:

When the appellant is the *defendant* . . . [its] only filing obligation within 15 days of the judgment below is the filing of the notice of appeal, which vests this Court with jurisdiction. . . . After these initial timing provisions are satisfied, Civil Rule 72.3(a) provides that all pleading thereafter “shall proceed as in other actions.” In “other actions,” this Court’s rules permit, by leave of Court, the subsequent filing of omitted counterclaims and other amended pleadings “when justice so requires”... Pleadings not required to be filed within the jurisdictional, 15 day appeal period, although violative of the mirror image rule, do not create an incurable jurisdictional defect. The Court can entertain motions to amend such pleadings, or order additional pleadings filed, to cure the mirror image rule violation and insure that the same parties and issues are before it *de novo* as were before the court below.⁶

Folks moved to dismiss the appeal on the basis it fails to comply with *Civil Rule 72.3* because the answers raise issues not before the Justice of the Peace Court. Levy Loan relying upon this Court’s decision in *Silview Farm Inc. v. Laushey*, 2006 WL 1112911 (Del. Comm. Pl., April 26, 2006) J. Clark, argues that the mirror image rule and *Rule 72.3* is satisfied when the complaint on appeal contains all the parties and issues below. Therefore, Levy Loan reasons that once the complaint satisfies the rule, the answer or responsive pleading may raise other issues because this Court’s rule of pleading thereafter apply.

⁵ CCP Civil Rule 72.3(c)

⁶ *Holloway v. Wheatley*, 2007 WL 3231589 at 2 (Del.Com.Pl.); See also *Silview Farms v. Laushey*, 2006 WL 111291 at *4 (Del.Com.Pl.)

I agree that *Silerview Farms Inc.* sets forth the threshold requirement that once the Court has jurisdiction, the Court may under its rules permit modification or amendment to the pleading or even permit joinder of additional parties. But that is not the circumstance in this case. Here, Levy Loan did not file a responsive pleading to Folks' claim in the Justice of the Peace Court; therefore, its position can, at best, be analyzed as a general denial of the allegation. If such is the case, to permit Levy Loan to file in its first pleading counterclaims, affirmative defenses, and motion for declaratory judgment would go beyond the present application of the rule. Levy Loan's reliance upon *Silerview Farms* goes beyond the holding of that case. The more consistent approach and what the rule contemplates is that the initial pleadings of both parties in the appeal must be consistent with the pleading in the Justice of the Peace Court. Levy Loan failed to file a responsive pleading in the Justice of the Peace Court; therefore, its initial pleading on appeal can only consist of a general denial of the allegations.

The initial complaint which complies with *Civil Rule 72.3(c)* will vest the court with jurisdiction. However, the answer which raises issues not raised below will not divest the court of jurisdiction. It is, however, subject to being stricken for failure to comply with the rule. This is the only reasonable method to proceed, consistent with *Civil Rule 72.3(c)* which requires the pleading to raise the same issues and contain the same parties below. To permit otherwise would afford an "appellee" the right to include issues not raised below which is inconsistent with both the spirit and intent of the rule. Additionally, it would open the door for an "appellee" to expand the

pleadings beyond those presented to the Justice of the Peace Court. After the initial pleadings, however, the parties may then proceed consistent with the court's rule as such rule applies to all other pending cases.

Since I conclude the initial pleading vest this Court with jurisdiction and application of the mirror image rule requires the appellee's initial responsive pleadings to present same issues as were set forth below, the inclusion of counterclaims are improper. The counterclaims raised in defendants' answer introduce issues that were not presented to the Justice of the Peace Court; therefore, the counterclaims and the affirmative defenses are hereby stricken and dismissed.

For the foregoing reasons, Folk's motion to dismiss the appeal is DENIED. The motion to dismiss Levy Loan's counterclaims, affirmative defenses, and application for declaratory judgment is GRANTED. Levy Loan has twenty (20) days from the date hereof to file an amended answer consistent with the rule.

SO ORDERED

ALEX J. SMALLS
CHIEF JUDGE

Levy's-OP Jun 09